

STATE OF MICHIGAN
COURT OF APPEALS

JOHN D. ZACHARSKI and PENNY L.
ZACHARSKI,

UNPUBLISHED
May 22, 2007

Plaintiffs-Appellants,

v

WAL-MART STORES, INC., d/b/a SAM'S
CLUB,

No. 274410
Saginaw Circuit Court
LC No. 05-058518-NO

Defendant-Appellee.

Before: Cooper, P.J., and Murphy and Neff, JJ.

COOPER, P.J. (*dissenting*).

I agree with the majority that the trial court did not err in holding that the case sounded in premises liability only. However, I must respectfully dissent because I disagree with my colleagues' conclusion with respect to the dispositive issue, whether a question of fact exists regarding the open and obvious nature of the hazard. I would reverse the circuit court order granting defendant's motion for summary disposition.

While shopping at defendant's store, plaintiff Penny Zacharski caught her foot on a pallet beneath a box of watermelons and fell. An open and obvious danger is one that an average person of ordinary intelligence would be able to discover upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Here, plaintiffs and their friends testified that the pallet was completely hidden from view on the day they were in the store; they assert that the photographs submitted by defendant are not an accurate depiction of the hazard as it appeared that day.

The question properly before us, then, is whether a casual inspection would reveal a pallet that was entirely hidden from view by a box of watermelons. It is noteworthy that the particular details plaintiffs argue are different in the photographs submitted by defendant are the details that would most likely make the pallet visible on casual inspection. Plaintiffs assert that on the day of the incident, the box rested on a grayish-brown pallet on a grayish-brown floor; in the photograph, the pallet is blue, and stands out clearly against the floor color. And plaintiffs assert that on the day they were in the store, the box was full, even bulging, whereas in the photographs the box is not full, and the pallet is clearly visible.

I would find, if the conditions on the day of the incident were as plaintiffs assert they were, then a reasonable passerby would not, on a truly casual inspection, notice the pallet. On a more thorough inspection, for example if the passerby knelt next to the box to see what was hidden underneath, the pallet might be discovered, but that is not what the law requires of an invitee.

I believe there is a question of fact regarding the appearance of the display that the trier of fact must resolve.

I would reverse.

/s/ Jessica R. Cooper